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ALEXANDER L. STEVENS,
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NO. 84-1491

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

PHILADELPHIA NEWSPAPERS, INC., et al.

Appellants

v.

MAURICE S. HEPPS, et al.

Appellees

On Appeal From the Judgment of the
Supreme Court of Pennsylvania

MOTION TO DISMISS APPEAL, OR IN THE
ALTERNATIVE TO AFFIRM JUDGMENT

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COUNTERSTATEMENT OF THE CASE

The procedural history and facts set forth by defendants (appellants in this Court) are incomplete. The following matters are also relevant:

1. During the course of pre-trial discovery, the trial judge ruled, based upon Pennsylvania's Shield Law, 42 Pa. C.S.A. §5942(a), 1/

1/ 42 Pa. C.S.A. §5942(a) provides:

No person engaged in, connected with, or employed by a newspaper of general circulation or any press association or any radio or television station, or any magazine of general circulation, for the purpose of gathering, procuring, compiling, editing or publishing news, shall be required to disclose the source of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any government unit.

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3. that plaintiffs were precluded from conducting any discovery regarding sources of information upon which defendants relied in publishing the articles in suit. Hepps v. Philadelphia Newspapers, Inc., 3 Pa. D. & C. 3d 693 (1977).
2. Throughout the articles there are references to "confidential" sources upon which the most damaging statements "linking" plaintiffs to organized crime were based. The defendant-reporters acknowledged from the witness stand their reliance on these confidential sources, but refused to identify them, based on the Shield Law. The trial court consistently upheld this claim of privilege during trial.

Pennsylvania Attorney General, Pa.

3. Plaintiffs requested the trial court to instruct the jurors that they had the right to draw adverse inferences from defendants' refusal to identify sources, but the trial court declined on the ground that to do so would undercut the Shield Law.
4. The trial court's ruling that the Pennsylvania statute, 42 Pa. C.S.A. §8343(b)(1), which places the burden of proving truth on a defendant, was unconstitutional was made sua sponte during the colloquy on the parties' proposed points for charge. Pennsylvania practice requires that the issue of the constitutionality of a state statute be raised in the pleadings and notice given to the Pennsylvania Attorney General, Pa.

R.C.P. 235(a),^{2/} or else it is deemed waived. Irrera v. SEPTA, 231 Pa. Super. 508, 515, 331 A.2d 705 (1974). However, defendants

2/ Rule 235. Notice to Attorney General.
Constitutionality of Statute.

(a) In any proceeding in a court subject to these rules in which an Act of Assembly is alleged to be unconstitutional and the Commonwealth is not a party, the party raising the question of constitutionality shall promptly give notice thereof by registered mail to the Attorney General of Pennsylvania together with a copy of the pleading or other portion of the record raising the issue and shall file proof of the giving of the notice. The Attorney General may intervene as a party or may be heard without the necessity of intervention. The court in its discretion may stay the proceedings pending the giving of the notice and a reasonable opportunity to the Attorney General to respond thereto. If the circumstances of the case require the court may proceed without prior notice in which event notice shall be given as soon as possible; or the court may proceed without waiting action by the Attorney General in response to a notice.

never requested the trial court to declare the statute unconstitutional. Indeed, during the colloquy, defense counsel explicitly stated that he was not asking the court to declare the statute unconstitutional. Plaintiffs therefore contended that defendants waived their right to assert that the statute was unconstitutional. The trial court rejected this argument, and the Pennsylvania Supreme Court did not address it because it decided that the statute was constitutional.

REASONS WHY THE APPEAL SHOULD BE DISMISSED, OR THE JUDGMENT AFFIRMED

A. Defendants Waived Their Right To Challenge The Constitutionality Of The Statute.

As noted above, in the course of five years of pretrial proceedings, and through

5-1/2 weeks of trial, defendants followed none of the procedures required to raise the issue of the unconstitutionality of a state statute. Further, near the end of the trial, when the court explicitly inquired, defense counsel disclaimed any intention to request the court to declare the statute imposing on the defendant the burden of proving truth unconstitutional. The trial court nonetheless declared the statute unconstitutional, and instructed the jury that plaintiffs had the burden of proving falsity.

In its opinion denying plaintiff's motion for a new trial, the trial court explained the reasons why it felt that defendants had not waived their rights. A-54 - A-62.^{3/} However, this decision is

^{3/} Page references are to the Appendix to Appellants' Jurisdictional Statement.

inconsistent with numerous Pennsylvania appellate decisions, including Wiegand v. Wiegand, 461 Pa. 482, 337 A.2d 256 (1975); Superior Mining Co. Property Tax Sale, 359 Pa. 357, 363, 59 A.2d 301 (1948); Irrera v. SEPTA, 231 Pa. Super. 508, 515, 331 A.2d 705 (1974); and Commonwealth ex rel. Bulson v. Bulson, 278 Pa. Super. 6, 419 A.2d 1327, 1328 note (1980).

Plaintiffs briefed and argued the issue of waiver to the Pennsylvania Supreme Court. That court did not reach the issue, however, because it determined that the statute was constitutional. Plaintiffs submit, however, that had the Pennsylvania Supreme Court considered the question, it would have followed its own earlier decisions cited above and ruled that defendants had waived the right to challenge the statute's constitutionality.

B. This Appeal Does Not Present A Substantial Federal Question Because the Allocation Of The Burden Of Proving Truth In A Libel Action Is A Matter Of State Law, As The Pennsylvania Supreme Court Properly Held.

In Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), this Court concluded that "the states should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of the private individual," 418 U.S. at 345-46, "so long as they do not impose liability without fault." Id., at 347. This conclusion reflected the very careful accommodation of two equally fundamental rights: the right to freedom of press, and the individual's interest in his own good name and reputation, the former being assured by the Federal Constitution, and the latter being reserved, under the Ninth and Tenth Amendments, primarily to the protection of the individual states. Id., at 340-41.

In so carefully crafted an opinion as Gertz, it is reasonable to assume that, if it was the Court's intention as a matter of constitutional law to shift to plaintiff the burden of proving falsity, that intention would have been explicitly stated because of the major effect such a shift would have on the accommodation of conflicting fundamental rights which was the whole purpose of the opinion. In fact, however, Gertz did not even mention the allocation of the burden of proving truth or falsity.

Defendants nonetheless argued below, and have submitted here, that Gertz sets out a constitutional mandate that a libel plaintiff has the burden of proving falsity because falsity is an element of fault. This argument is without merit. As the Pennsylvania Supreme Court noted, "[a]

plaintiff can demonstrate negligence in the manner in which the material was gathered, regardless of its truth or falsity." A-19, note 13. Those courts that have held to the contrary have either failed to recognize this simple fact or have decided, as a matter of state law, that a libel plaintiff should have the burden of proving falsity.

In accepting its responsibility to strike the appropriate balance between freedom of press and sanctity of individual reputation, the Pennsylvania Supreme Court concluded:

First, that falsity is an element of the cause of action of libel. A-7, note 2.

Second, in keeping with long-standing Pennsylvania precedents holding that, in both criminal and civil proceedings, the character or reputation of an individual is presumed to be good (A-4), falsity of

defamatory statements will be presumed, with the burden placed upon the alleged defamer to prove that the accusations are true. A-7, note 2.^{4/}

Third, in Pennsylvania in particular, the news media are privileged in civil

4/ This rule is further buttressed by Article 1, Section 1 of the Declaration of Rights to the Pennsylvania Constitution, which states:

Section 1. Inherent Rights of Mankind. All men are born equally free and independent, and have certain inherent and inalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing and protecting property and reputation, and of pursuing their own happiness.

Similarly, Section 11 of the Declaration of Rights provides:

...every man for any injury done him in his land, goods, person or reputation shall have remedy by due course of law....

(Emphasis added.)

libel actions to withhold the identity of their sources of information. 42 Pa. C.S.A. §5942(a). As a result, since a civil libel plaintiff is denied access to the sources of information upon which the defamatory statements are based, he would be unfairly restricted in his ability to prove falsity if that burden were to be placed upon him. The Pennsylvania Supreme Court properly viewed this as further justification for placing the burden of proving truth on a libel defendant. A-21 - A-22.^{5/}

5/ The issue of confidential sources, and the application of the Pennsylvania Shield Law, distinguishes this case factually from Wilson v. Scripps-Howard Broadcasting Company, 642 F.2d 371 (6th Cir.), cert. granted, 454 U.S. 962, cert. dismissed pursuant to Rule 53, 454 U.S. 1130 (1981).

The thoughtful opinion of the Pennsylvania Supreme Court reflects its understanding of Gertz, and its consideration of the history and unique circumstances of Pennsylvania constitutional, statutory, and decisional law.

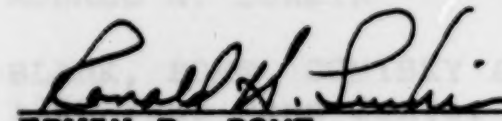
CONCLUSION

Defendants' appeal should be dismissed because the allocation of the burden of proving truth in a libel action is a matter of state, not federal, law.

Alternatively, the judgment of the Pennsylvania Supreme Court should be affirmed because that court correctly decided that Gertz v. Robert Welch, Inc. does not mandate that the burden of proving falsity in a libel action must be placed on plaintiff as a matter of federal constitutional law.

Finally, the appeal should be dismissed because defendants waived their right to contest the constitutionality of the state statute in question.

Respectfully submitted,



EDWIN P. ROME
RONALD H. SURKIN

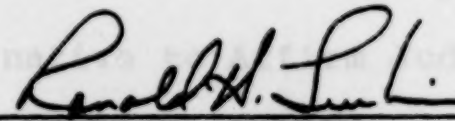
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Date: April 11, 1985

**DISCLOSURE STATEMENT
PURSUANT TO RULE 28.1**

None of the corporate appellees has any parent, subsidiary or affiliated corporation.


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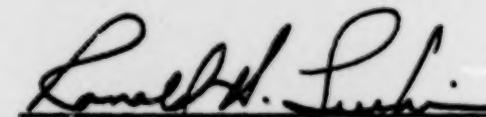
Date: April 11, 1985

CERTIFICATE OF SERVICE

RONALD H. SURKIN, a member of the Bar of the Supreme Court of the United States, hereby certifies that three copies of the attached Motion to Dismiss Appeal, or in the Alternative to Affirm Judgment were served by hand delivery on April 11, 1985 on counsel for appellants as follows:

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The foregoing individual is the only person required to be served.



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